RECORD
AND
BRIEFS

No. 16-498

IN THE

Supreme Court of the United States

DAVID PATCHAK,
Petitioner,
v.
RYAN ZINKE,
SECRETARY OF THE INTERIOR, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for
the District of Columbia Circuit

BRIEF OF FEDERAL COURTS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici listed in the Appendix are law professors who teach and write in the fields of constitutional law and federal jurisdiction, with particular attention to the separation of powers between the political branches and the judiciary. *Amici* come together in this case out of a shared belief that the decision below, *see* JA 24,[2] is in direct and irreconcilable tension with core separation-of-powers principles, including those articulated in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), and that reinforcement of those principles is even more important after *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016).

SUMMARY OF ARGUMENT

As all eight Justices in *Bank Markazi* agreed, *Klein* has stood—and stands today—as a vital bulwark of judicial independence vis-à-vis the political branches. And although the majority and the dissent in *Bank Markazi* disagreed over the precise scope of the *Klein* rule, the Court was unanimous that, at a minimum, "Congress could not enact a statute directing that, in

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[1] The parties have each consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. Pursuant to Rule 37.6, counsel for *amici* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

[2] References to the Joint Appendix are in the form "JA 1."

'Smith v. Jones,' 'Smith wins.'" 136 S. Ct. at 1323 n.17; *see also id.* at 1334–35 (Roberts, C.J., dissenting).

That invalid legislative exercise of judicial power is exactly what the statute at issue here—the Gun Lake Trust Land Reaffirmation Act ("Gun Lake Act"), Pub. L. No. 113-179, 128 Stat. 1913 (2014)—attempts. Not only does the Gun Lake Act effectively direct a specific result in a pending suit (*after* this Court ruled that the suit should go forward, *see Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012)) without amending substantive law, but, like the statute that this Court struck down in *Klein*, it further dictates to courts that the suit at issue "*shall* be promptly dismissed." *Id.* § 2(b), 128 Stat. at 1913 (emphasis added); *see also* Act of July 12, 1870, § 1, 16 Stat. 230, 235 ("[I]n all cases where judgment shall have been heretofore rendered in the court of claims in favor of any claimant on any other proof of loyalty than such as is above required and provided, . . . the Supreme Court shall, on appeal, have no further jurisdiction of the cause, *and shall dismiss the same* for want of jurisdiction." (emphasis added)).

As *Bank Markazi* reflects, disagreement persists among courts and commentators (including *amici*) concerning the contemporary doctrinal contours and theoretical underpinnings of *Klein*. But there is also widespread agreement about certain core principles—principles that the Gun Lake Act violates. "[H]owever difficult it may be to discern the line between the Legislative and Judicial Branches, the entire constitutional enterprise depends on there *being* such a line." *Bank Markazi*, 136 S. Ct. at 1336 (Roberts, C.J.,

dissenting). And if the Court of Appeals is correct that the Gun Lake Act falls on the constitutional side of that line, then it really will be the case that, "[h]ereafter, with this Court's seal of approval, Congress can unabashedly pick the winners and losers in particular pending cases." *Id.* at 1338.

This Court "cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush." *Stern v. Marshall*, 564 U.S. 462, 503 (2011); *see also id.* at 502–03 ("A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely."). However modest an incursion of Article III the Gun Lake Act may appear to be, and however discrete the implications of the specific dispute presented here are, holding that Congress has the constitutional authority to instruct that pending suits "shall be dismissed" would compromise the spirit and letter of *Klein*—and seriously jeopardize the independence of the federal courts going forward. Instead, this Court should reaffirm such a foundational and fundamental principle of judicial power, and reverse the decision below.

ARGUMENT

I. An Act of Congress Violates the Separation of Powers When It Compels a Specific Judicial Outcome Without Amending Substantive Law.

This Court's decision in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), has long provoked debate among Federal Courts scholars, who have offered a wide range of diverse—and, at times, conflicting—

interpretations of its meaning. The academic give-and-take aside, there has generally been widespread agreement that, whatever else *Klein*'s language and holding may entail, it stands at a minimum for the proposition that Congress may not direct the result in a pending case without amending the underlying law.[3]

This Court's recent decision in *Bank Markazi* reflects both the confusion over *Klein*'s contours and the consensus over its core. Thus, even in rejecting the claim that 22 U.S.C. § 8772 violated *Klein*, Justice Ginsburg's majority opinion acknowledged the structural significance of the *Klein* rule—and the corollary that "Congress, no doubt, may not usurp a court's power to interpret and apply the law to the [circumstances] before it, for [t]hose who apply [a] rule to particular cases, must of necessity expound and interpret that rule." 136 S. Ct. at 1323 (alterations in original; internal quotation marks and citations omitted).

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[3] *See, e.g.*, William D. Araiza, *The Trouble with* Robertson*: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 Cath. U. L. Rev. 1055, 1079, 1088 (1999); Evan H. Caminker, Schiavo *and* Klein, 22 Const. Comment. 529, 533 (2005); Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 Mercer L. Rev. 697, 718-21 (1995); Stephen I. Vladeck, *Why* Klein *(Still) Matters: Congressional Deception and the War on Terrorism*, 5 J. Nat'l Sec. L. & Pol'y 251, 252–53 (2011); Howard M. Wasserman, *The Irrepressible Myth of* Klein, 79 U. Cin. L. Rev. 53, 69-70 (2011); Evan C. Zoldan, *The* Klein *Rule of Decision Puzzle and the Self-Dealing Solution*, 74 Wash. & Lee L. Rev. (forthcoming 2017).

Thus, the nub of the dispute in this case is whether the Gun Lake Act simply amends existing law in a manner that does (and may) affect pending cases, or whether it exercises judicial, rather than legislative, power. A proper understanding of *Klein*, and of the deeper separation-of-powers principles it protects, compels the conclusion that the Gun Lake Act falls into the latter category, and is therefore unconstitutional.

A. *Klein* is best understood to forbid Congress from directing the result in a pending case without amending the underlying law.

During the Civil War, Congress enacted the Abandoned and Captured Property Act, ch. 120, 12 Stat. 820 (1863), which provided an opportunity for persons whose property was seized in the rebellious states to obtain the proceeds from sale of that property if they could prove that they had not "given any aid and comfort" to the rebellion. Shortly thereafter, President Abraham Lincoln issued a presidential proclamation offering a full pardon—including restoration of rights in seized property—to persons who had been engaged in the rebellion if they took a new loyalty oath.

Some years later, in *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870), this Court held that a person taking such an oath and receiving a pardon would be deemed legally loyal, and therefore entitled to restoration of property under the Abandoned and Captured Property Act. The Reconstruction Congress, generally skeptical of President Andrew Johnson's conciliatory policy toward the conquered South, responded by enacting a statute barring the use of a pardon to prove loyalty, taking a pardon to be conclusive

proof that the claimant *had* been disloyal in fact, and instructing the federal courts to dismiss claims predicated on a pardon for want of jurisdiction.[4] As the statute provided,

> in all cases where judgment shall have been heretofore rendered in the [C]ourt of [C]laims in favor of any claimant on any other proof of loyalty than such as [the proviso requires], the Supreme Court shall, on appeal, have no further jurisdiction of the cause, *and shall dismiss the same for want of jurisdiction.*

Act of July 12, 1870, § 1, 16 Stat. 230, 235 (emphasis added).

This Court struck down that statute in *Klein*. The Court held that Congress's action was not a valid "exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power" of the Supreme Court. *Klein*, 80 U.S. (13 Wall.) at 146. Even though Congress may have broad power to restrict this Court's appellate jurisdiction.[5] Chief Justice Chase wrote that Congress may not "prescribe rules of decision to the Judicial

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[4] *See generally* Wasserman, *supra* note 2, at 59–63; Amanda L. Tyler, *The Story of* Klein: *The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts*, in *Federal Courts Stories* 106 (Vicki C. Jackson & Judith Resnik eds., 2009).

[5] The Court had decided *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), only three years earlier.

Department . . . in cases pending before it." *Id.* Under the statute, "the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely opposite." *Id.* at 147. By so requiring, "Congress has inadvertently passed the limit which separates the legislative from the judicial power." *Id.* Finally, the Court also suggested that by impairing the effect of a presidential pardon, the law "infring[ed] the constitutional power of the Executive." *Id.*

It may be tempting to read *Klein* simply as a case about the pardon power, holding that Congress may not impair the full effect of a presidential pardon any more than it may restrict the President's other exclusive powers. *See, e.g., Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (holding that Congress may not impair the President's exclusive power to recognize foreign nations). Indeed, in its brief in opposition to certiorari, the Federal Respondents offered precisely this argument, suggesting that "[t]he problem in *Klein* was that *other* provisions of the statute mandated a rule of decision for the federal courts." U.S. Br. Opp. 10. As the Federal Respondents summarized *Klein*, "[t]he statute required courts to treat a Presidential pardon as proof of disloyalty and provided that whenever a judgment of the Court of Claims was based on a pardon, the Supreme Court would lose jurisdiction over the appeal." *Id.*; *see also id.* ("Unlike the statute in *Klein*, Section 2(b) of the Gun Lake Act eliminates a category of cases . . . from the jurisdiction of the federal courts, regardless of what those cases are about or what the court in any pending case may have decided.").

But Chief Justice Chase plainly raised the pardon issue in *Klein* only *after* identifying a standalone violation of Article III: Having found that the statute "passed the limit which separates the legislative from the judicial power," he observed that "[t]he rule prescribed is *also* liable to just exception as impairing the effect of a pardon." *Klein*, 80 U.S. (13 Wall.) at 147 (emphasis added); *see also Bank Markazi*, 136 S. Ct. at 1334 n.2 (Roberts, C.J., dissenting) (describing "*Klein*'s unmistakable indication that the impairment of the pardon power was an *alternative* ground for its holding, secondary to its Article III concerns"); Caminker, *supra* note 3, at 533 (observing that "the structure and language of the Court's opinion make clear that the two separation of powers principles discussed in *Klein* operate in the disjunctive").

Indeed, as *Bank Markazi* instructs, *see* 136 S. Ct. at 1325–26 (internal quotation marks omitted), *Klein*'s language about "prescrib[ing] rules of decision" must be read in concert with numerous subsequent decisions holding that Congress may amend the law governing pending litigation, and that courts must ordinarily give such amendments retroactive effect if Congress so intends. *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272–73 (1994); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226 (1995) ("When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.").

Klein itself recognized as much by distinguishing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59

U.S. (18 How.) 421 (1856). In May of 1852, the Court had held that the Wheeling Bridge was an impediment to navigation and ordered it removed. *See Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852). In August of the same year, however, Congress passed an act declaring that the bridge (as well as another bridge in Ohio) was a lawful structure and designating both as federal post roads. In the wake of this new statute, the Court acknowledged that its prior decree could no longer be executed, and it rejected any argument that the new law interfered with the judicial power. *See* 59 U.S. (18 How.) at 431–32, 435–36.[6]

The *Klein* Court found this decision perfectly consistent with its own holding. "No arbitrary rule of decision was prescribed in that case," Chief Justice Chase wrote, "but the court was left to apply its ordinary rules to the new circumstances created by the act." *Klein*, 80 U.S. (13 Wall.) at 146–47. In *Klein* itself, by contrast, "no new circumstances have been created by legislation," *id.* at 147, all the more so in light of Congress's mandate that all matters implicating the statute "*shall* be dismissed"—language that

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[6] The *Wheeling Bridge* Court also emphasized that Congress's statute altered only the Court's prospective decree directing removal of the bridge. The Court suggested that the case would have come out differently had there been a claim for damages, *Wheeling Bridge*, 59 U.S. (18 How.) at 431, and in fact the Court did enforce the portion of its initial decree requiring the defendants to pay costs, *id.* at 436. But we think the critical aspect of *Wheeling Bridge* was that Congress had permanently, and for all legal purposes, altered the underlying legal status of the bridge.

contemplated no further judicial analysis. Put another way, the constitutional infirmity in the statute before the Court was not that it purported to withdraw the Supreme Court's appellate jurisdiction, but that it proceeded to direct the Court to dismiss all pending appeals *without* the opportunity to adjudicate its jurisdiction. The Court still had the power to review the constitutionality of that latter mandate as part of its jurisdiction to determine its jurisdiction. But if Congress *could* so direct the Court, then Congress could deprive the Court of jurisdiction to determine its jurisdiction by enacting effectively unreviewable jurisdiction-stripping provisions.

To illustrate the narrowness of *Klein*'s core principle when read in conjunction with Congress's acknowledged power to change the underlying law, consider *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992). There, the Court was asked to review the validity of the Northwest Timber Compromise, a federal statute modifying timber harvesting restrictions in forests home to the endangered spotted owl. The statute was enacted in response to ongoing litigation challenging whether the Bureau of Land Management had adequately considered the impact of permitted logging on the owl. As part of a compromise restricting logging in some areas and permitting it in others, section 318 of the statute designated particular portions of federal land, including that concerned in the ongoing litigation, as open to timber sales, and it mandated that management of the land pursuant to the law's new provisions would be "adequate consideration for the purpose of meeting the statutory requirements that are

the basis for" the ongoing litigation, which it referred to by name and docket number. *See id.* at 433–35.

The Ninth Circuit had held that section 318 violated *Klein* because it directed the resolution of a pending case without amending the underlying law, but this Court reversed. Assuming that the Court of Appeals' reading of *Klein* had been correct, the Court nonetheless found that the statute "compelled changes in law, not findings or results under old law." *Robertson*, 503 U.S. at 438. That conclusion, on *Robertson*'s facts, seems perfectly in line with *Klein*'s distinction of the *Wheeling Bridge* case: Congress's intervention exempted the specific provisions of the timber compromise from the general requirement that agencies consider environmental impacts.

And although the compromise had the effect of eliminating the legal basis for the plaintiffs' suit, the statute changed the law governing not just that suit but any other challenge to the timber sales affected by the compromise. Hence, "[t]o the extent that [the statute] affected the adjudication of the [pending] cases, it did so by effectively modifying the provisions at issue in those cases," *id.* at 440, leaving to *courts* the quintessentially judicial work of *applying* those substantive modifications to pending and future cases. Thus, *Robertson* maintained *Klein*'s central distinction between directing law application and amending the underlying law, and it illustrates that Congress may still achieve quite specific results when doing the latter, and those results may profoundly affect pending litigation.

B. Precluding Congress from directing results without changing the law serves important separation of powers values.

This Court's decision in *Robertson* did not expressly adopt the view that *Klein*'s prohibition turns on the difference between directing the outcome of a case and amending the underlying law; it assumed that the Court of Appeals had been correct in so reading *Klein* but found that the rule had not been violated. *See Robertson*, 503 U.S. at 441. But there is broad agreement among Federal Courts scholars that *Klein* must mean at least this much,[7] and *Bank Markazi* appears to confirm this view. *See* 136 S. Ct. at 1326. Whatever else, if anything, *Klein* may forbid, its prohibition on directing results without amending the law serves critical values of judicial independence and integrity.

At least two sets of separation of powers values are salient in this context. The first concerns the protection of litigants from an adjudicative process dominated by majoritarian politics. When Congress amends the underlying law, it necessarily deals with the subject of legislation in a more general way than when it simply directs the outcome of a pending case. Congress may be able to foresee the impact of the law on the present litigation, but it must also contemplate that, having been amended generally, the law may govern other unforeseen cases in the future. Even in *Robertson*, the specific mention of the pending cases in the statute was merely illustrative; the act's provisions nonetheless governed any other litigation that might arise

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[7] *See* sources cited in note 3, *supra*.

concerning the affected timber sales. *See* 503 U.S. at 440 ("The reference to [specific cases] . . . served only to identify the five 'statutory requirements that are the basis for' those cases . . . . To the extent that subsection (b)(6)(A) affected the adjudication of the cases, it did so by effectively modifiying the provisions at issue in those cases.").

The Founders were concerned that the early state legislatures had too often taken judicial matters into their own hands. *See* Federalist No. 48, at 310–12 (Isaac Kramnick ed., 1987) (1788) (James Madison); *see also Plaut*, 514 U.S. at 221–22 (collecting sources); *INS v. Chadha*, 462 U.S. 919, 960–62 (1983) (Powell, J., concurring in the judgment) (same). James Madison thus had this abuse, among others, in mind when he wrote that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Federalist No. 47, *supra*, at 303 (James Madison).

To that end, our Constitution requires the concurrence of multiple institutional actors before individuals may be deprived of liberty or property. *See, e.g., United States v. Brown*, 381 U.S. 437, 443 (1965) ("For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will."). This principle forces legislators, at least to some extent, to enact general laws behind a veil of ignorance, knowing that those laws may

well be applied to their own constituents or supporters. *See, e.g., Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) (explaining how the requirement that legislatures may not control to whom the laws will be applied prevents abuse of power). And it assures individuals that when the law is actually applied to them, it will be in a judicial forum with all the procedural protections that such a forum affords. *See Chadha*, 462 U.S. at 966 (Powell, J., concurring in the judgment) (noting the lack of procedural safeguards when legislatures directly effect deprivations of rights); *cf. Hurtado v. California*, 110 U.S. 516, 535–36 (1884) ("[A] special rule for a particular person or a particular case" cannot properly be described as a "law.").

The second set of values involves the independence and integrity of the courts themselves. The judiciary's power "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), is the power to interpret and apply the applicable procedural and substantive law according to the court's own best judgment. *Changing* the applicable law does not intrude on that judgment.

But telling a court what outcome to reach, what legal conclusions to draw, or how to apply the existing law to facts *without* leaving room for exercises of judicial power compromises the independence and integrity of the courts. Moreover, this threat to judicial integrity is also a threat to the mechanisms of accountability that ordinarily discipline the democratic process. Congress does not have the same obligation of principled decisionmaking that courts do. But Congress should not be able to evade democratic responsibility for the

choices it makes by misrepresenting those choices as judicial decrees. As Henry Hart explained over a half-century ago,

> It is one thing to exclude completely the federal courts from adjudication; it is quite another to vest the federal courts with jurisdiction to adjudicate but simultaneously restrict the power of those courts to perform the adjudicatory function in the manner they deem appropriate. In the former instance, by wholly excluding the federal courts, Congress loses its ability to draw upon the integrity possessed by the Article III judiciary in the public's eyes. In contrast, where Congress employs the federal courts to implement its deception, the harmful consequences to that judicial integrity are far more significant.

Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1372 (1953); *see also* Lawrence G. Sager, Klein's *First Principle: A Proposed Solution*, 86 Geo. L.J. 2525, 2529 (1998) (arguing that *Klein* is directed toward preventing the "co-optation of the judiciary's national authority").

As Professor Hart suggested, the risk is that Congress will seek to evade responsibility for its laws by contriving that they be announced as legal judgments. That undermines not only the integrity of the courts' decisional processes but also the operation of democratic accountability on the legislative side.

This Court has affirmed the institutional independence and integrity of the Article III courts in ringing terms in cases like *Plaut*, 514 U.S. at 239–40, and *Stern*, 564 U.S. at 503. But it does little good to prevent Congress from reopening final judicial judgments or from reassigning decisionmaking responsibility to non-Article III courts if Congress may simply tell the Article III judiciary—directly or indirectly—how to decide cases in the first place. *Cf. New York v. United States*, 505 U.S. 144 (1992) (holding that the Constitution prohibits Congress from dictating the content of *state* policy as a matter of federal law).

That is why scholars have interpreted *Klein* as insisting that "[t]he judiciary will not permit its articulate authority to be subverted to serve ends antagonistic to its actual judgment; the judiciary will resist efforts to make it seem to support and regularize that with which it in fact disagrees." Sager, *supra*, at 2529; *see also* Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of* United States v. Klein, 100 Nw. U. L. Rev. 437, 438–39 (2006) (reading *Klein* to forbid Congress from enlisting the judiciary in deceiving the electorate as to the actual state of the law). In other words, if the judiciary interprets the preexisting law to require a particular outcome, it may not be required to reach the opposite conclusion unless that preexisting substantive law is duly changed.

C. *Klein*'s core holding survived *Bank Markazi*.

Although many of the *amici* (and two Justices) argued in *Bank Markazi* that 22 U.S.C. § 8772 therefore violated the separation-of-powers principle at *Klein*'s core, a majority of this Court disagreed. But rather than entombing the *Klein* rule, *Bank Markazi* necessarily sharpened it—upholding section 8772 only because (1) "it directs courts to apply a new legal standard to undisputed facts," 136 S. Ct. at 1325; (2) "laws that govern[] one or a very small number of specific subjects" are not per se unconstitutional, *id.* at 1326; and (3) "§ 8772 is an exercise of congressional authority regarding foreign affairs, a domain in which the controlling role of the political branches is both necessary and proper," *id.* at 1328.

Properly understood, *Bank Markazi* leaves intact the analytical core of the *Klein* rule: An Act of Congress that does *not* "direct[] courts to apply a new legal standard to undisputed facts," but merely directs courts to rule in a particular manner on a pending case, runs afoul of the separation of powers. As *Klein* teaches, such a measure represents an exercise by the political branches of judicial—rather than legislative—power.

II. The Gun Lake Act Violates *Klein*.

Notwithstanding the above analysis, the Court of Appeals in this case—even with the benefit of *Bank Markazi*—concluded that the Gun Lake Act is consistent with *Klein*. As Judge Wilkins wrote for the panel,

> we conclude that the Gun Lake Act has amended the substantive law applicable to Mr. Patchak's claims. That it did so without directly amending or modifying the APA or the IRA is no matter. Through its ratification and confirmation of the Department of the Interior's decision to take the Bradley Property into trust, expressed in Section 2(a), and its clear withdrawal of subject matter jurisdiction in Section 2(b), the Gun Lake Act has "changed the law." More to the point, Section 2(b) provides a new legal standard we are obliged to apply: if an action relates to the Bradley Property, it must promptly be dismissed. Mr. Patchak's suit is just such an action.

JA 34–35 (citations omitted).

In other words, the Court of Appeals' conclusion that the Gun Lake Act permissibly "directs courts to apply a new legal standard to undisputed facts" turns on two separate determinations: That section 2(a) altered the substantive law to be applied by courts to Petitioner's suit; and that section 2(b) did so, as well. Neither of these arguments, properly understood, withstands scrutiny.

First, with regard to section 2(a), it is hardly clear that Congress intended to *alter* substantive law, as opposed to simply *confirming* it. *See* Pet. 21–24. But even assuming *arguendo* that section 2(a) *did* change the substantive law in Petitioner's case, for such a maneuver to be constitutional, it must follow that the change would be implemented by the *courts*.

As the majority stressed in upholding 22 U.S.C. § 8772 in *Bank Markazi*, the factual determinations required by the statute were not "mere fig leaves," for "it [was] quite possible that the [c]ourt could have found that defendants raised a triable issue as to whether the [b]locked [a]ssets were owned by Iran, or that [other parties] ha[d] some form of beneficial or equitable interest." 136 S. Ct. at 1325 (alterations in original; citations omitted).[8]

Thanks to section 2(b) of the Gun Lake Act, however, the "new law" purportedly created by section 2(a) would benefit from no similar judicial construction; as soon as a court determines that an action "relat[es] to the land" described in section 2(a), it "shall be promptly dismissed." Given that there is no question that this case qualifies as such a suit, *see Patchak*, 567 U.S. at 227–28, the net effect of the Gun Lake Act is, as the proceedings below demonstrate, to compel a specific judicial result *without* any meaningful opportunity for legal or factual analysis of how any "new" law bears upon the merits. Put another way, section 2(b) prevents courts from asking the critical separation-of-powers question that

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[8] Another way of giving content to the distinction between "amending" substantive law and "confirming" it is to treat the latter class as encompassing only those statutes that set government policy or achieve a governmental objective in a way that does more than simply *benefit* the government as a party in a pending case, as is true under the Gun Lake Act. *See* Zoldan, *supra* note 2 (arguing for this understanding of *Klein*).

Klein and its progeny require, *i.e.*, whether section 2(a) actually changes the substantive law.

Second, it hardly saves the Court of Appeals' analysis to assert that, instead of (or in addition to) section 2(a), section 2(b) of the Gun Lake Act constitutionally changes the law. Whether or not section 2(b) is properly characterized as "jurisdictional," *see* Pet. at 21 n.7, there can be no doubt that it confers no latitude or discretion upon the federal courts; on the contrary, it commands them to take a specific action—"dismissal"—in all cases related to the Bradley Property. Contrary to the Court of Appeals' analysis, section 2(b) does not "provide[] a new legal standard we are obliged to apply," JA 34; it dictates a specific legal *result* without any room for judicial construction other than the threshold determination that the case at bar falls within the statute's mandate of dismissal.

Rather than squarely defend the Court of Appeals' analysis on this point, the Federal Respondents frame the matter slightly differently, arguing that "Congress unquestionably has the power to alter the jurisdiction of the federal courts, *which is what required dismissal* of petitioners' suit." U.S. Br. Opp. 12 (emphasis added). In other words, in the Federal Respondents' view, the aspect of the Gun Lake Act that mandated dismissal of Petitioner's suit was the withdrawal of jurisdiction, not the statutory command that the suit "shall be promptly dismissed."

Of course, it may well be that, exercising the judicial power, a federal court would have concluded that the first clause of section 2(b) does indeed require dismissal of petitioners' suit, and is constitutional insofar as it so

provides. But section 2(b) does not *allow* such an exercise of judicial power; rather, "what required dismissal of petitioners' suit" in this case was an exercise of legislative, not judicial, power—to wit, section 2(b)'s command that suits like this one "shall be promptly dismissed."[9] As noted above, *see ante* at 9–10, the effect of such a command, if upheld, is to deprive the courts of jurisdiction to determine their jurisdiction.

Setting the secondary issue of pardons aside, on the Court of Appeals' logic, the *Klein* statute itself would have been upheld. Like the Gun Lake Act, the statute at issue in *Klein* had two principal clauses—the substantive clause, which mandated that pardons be taken as conclusive proof of *dis*loyalty under the Abandoned and Captured Property Act; and the jurisdictional clause, which formally stripped the federal courts of jurisdiction over all claims under the

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[9] Contrast this language, for example, with the statute at issue in *National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001). That statute, on which the Federal Respondents rely, was "enacted while a case was pending in district court and provided that administrative decisions approving the location of the World War II Memorial in Washington D.C., 'shall not be subject to judicial review.'" U.S. Br. Opp. 12 (quoting *Nat'l Coalition*, 269 F.3d at 1094). Unlike both the Gun Lake Act and the statute at issue in *Klein*, however, that statute *only* removed federal jurisdiction, and did not additionally command the federal courts to dismiss all cases potentially subject to that proviso. It may have led to the same *result*, but only after a constitutionally significant exercise of judicial, rather than legislative, power.

Abandoned and Captured Property Act turning on pardons—and then, like the Gun Lake Act, commanded the dismissal of any such pending cases.

By the D.C. Circuit's reasoning, the "change in law" central to the Court of Appeals' analysis was the precise "change in law" that this Court held to be unconstitutional in *Klein*. Unless *Klein* stands *only* for what has rightly been described as its "alternative" holding—that Congress cannot use its power over federal jurisdiction to negate the effect of powers vested exclusively in the President, *but see ante* at 7—then the Gun Lake Act must fall.

Finally, although the Gun Lake Act—and the ongoing dispute over the Bradley Property—may seem limited in scope to a specific set of facts, *see, e.g.*, U.S. Br. Opp. 14, "[s]light encroachments create new boundaries from which legions of power can seek new territory to capture," *Reid v. Covert*, 354 U.S. 1, 39 (1957) (plurality opinion). Although "[i]t may be that it is the obnoxious thing in its mildest and least repulsive form," this Court "cannot overlook the intrusion." *Stern*, 564 U.S. at 503 (internal quotation marks omitted). After all, "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Boyd v. United States*, 116 U.S. 616, 635 (1886).

* * *

Other cases may present harder questions with regard to the line between proper exercises of legislative power and improper exercises of judicial power. But the imperative for judicial reaffirmation of

the *Klein* principle could not be stronger, and the Gun Lake Act could not be a better candidate for such a ruling.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the decision below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

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